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Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Amendment to JMP Telecom Systems, Inc.'s comments to the Notice of Proposed Rulemaking for Implementation of Section 309(j) of the Communications Act (FCC 93-455)

To the Office of the Secretary:

On November 10, our office discovered the comments our personnel forwarded to you were not the correct version. Due to several administrative errors, the wrong package of comments was FEDEX to your office on November 9, 1993. I was shocked our corporate comments forwarded to your office on November 9, 1993 was a draft version only.

We would like your cooperation in replacing all copies (original and nine copies) with the revised version (attached). The attached do not change the scope of the original comments to the Notice of Proposed Rulemaking for Implementation of Section 309(j) of the Communications Act (FCC 93-455), but improves the quality of our comments (e.g., grammar improvements).

Your cooperation to this matter would be greatly appreciated. If you have any questions, please contact me at the above phone numbers.

Sincerely,

JMP Telecom Systems, Inc.

James M Rhoads

James M. Rhoads
President

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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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In the Matters of	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act	)	
Competitive Bidding	)	PP Docket No. 93-253
	)	
	)	

INITIAL COMMENTS OF JMP TELECOM SYSTEMS, INC.

JMP Telecom Systems, Incorporation ("JMP") and according to the Commission's Notice of Proposed Rulemaking, FCC 93-455, Adopted September 23, 1993 and Released October 12, 1993 (the "NPRM"), hereby files its Initial Comments in this proceeding.

INTRODUCTION

JMP commends the Commission for their efforts in preparing the NPRM for the implementation of Section 309(j) of the Communications Act as mandated by the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). JMP files the following comments.

1. Experimental and Pioneer Preference Licenses. The NPRM implies no consideration or any preference will be given to Experimental or Pioneer Preference licensees in the upcoming auctions. The proposed Commission actions are unfair. Petitions for reconsideration will most likely be filed to the Commission by each licensee. Recommend the Commission reject this "plan of action" and grant regular licenses to those licensees that successfully developed new technologies or brought new services to the marketplace (e.g., Local Multipoint Distribution Service "LMDS"). This recommendation is consistent with the original Commission's intentions as promoted under previous Administrations.

The Commission should reconsider how they will treat licensees (individuals and businesses) who have taken the risks to develop new technologies, products or services. The Commission under previous administrations, President Reagan and President Bush, encouraged individuals and businesses to develop new technologies, products or services by awarding Experimental and Pioneer Preference licenses. The license, Experimental or Pioneer Preference, encouraged individuals and businesses to start new developments. The experimental or pioneer preference license represented a greater opportunity to obtain a regular license as a reward by developing new technologies, products or services. Future Commission efforts to encourage the industry to develop new technologies, products or services will be tarnished if the NPRM actions are implemented.

2. Preferential Treatment for Designated Groups (Small Businesses, Rural Telephone Companies, and Businesses Owned By Women and Minorities). Concur with the NPRM to give preferential treatment to designated groups if competitive bidding is used to award future licenses as determined by the Commission. Otherwise, large telecommunication firms (e.g., BELL companies) will be able to monopolize the auctions.

The "Budget-Act" requires the Commission to give preferential consideration to small businesses, rural telephone companies, and businesses owned by women and minorities in the competitive bidding process. This law will be difficult to carry out based upon past and recent court rulings relating to "minority" rights. The Commission's decision to give minority preference to designated groups (based upon race, ethnic background, sex, sexual orientation, etc.) probably will be unresolved for the near future. The "minority" definition is a risk factor to the Commission's objective of rapid deployment of new technologies and services to the marketplace. The issue is likely to be subject to extensive litigation by different groups.

The "small business" definition (in terms of assets, size, sales, number of employees, etc.) must be carefully defined. The attributes used to define a "small business" can possibly eliminate many telecommunication businesses (current and future) from the auction process when the Commission awards future licenses for new services. Businesses who believe the "small business" definition is not appropriate for a particular type of service probably will petition the Commission for reconsideration, or ask the U.S. Courts to resolve issue(s). This is a risk factor to the Commission's objective of rapid deployment of new technologies and services to the marketplace.

To avoid the unnecessary litigations and time delays, JMP recommends the Commission amend the NPRM as follows:

(a) Award one set of market licenses by auction to large firms (e.g., AT&T) and to other entities (e.g., an alliance of small businesses) who decide to participate in the auction. All NPRM rules for competitive bidding should apply.

(b) Award another set of licenses (identical to the auctioned licenses) in the same market by lottery to applicants from designated groups. The lottery winner will have to pay the U.S. Government an annual royalty (a percentage of the yearly gross revenues). The amount of the annual royalty payment will increase during the life of the license (e.g. 10 years). The licensee must pay the price equivalent to the lowest bid price made in the auction for the identical license. The lottery should be conducted after the auction winners are declared to decide the license's market price. Penalties should be enacted to discourage the speculative operator from selling his license before the Commission's performance requirements are satisfied (e.g., minimum service time). The licensee(s) should not be allowed to make a profit from the sell of the license if the they fail to meet the Commission's performance requirements.

JMP disagrees with Rulemaking Section 70. The Commission said it would be difficult to collect a royalty payment as a form of compensation. If the rules establish the royalty payment guidelines (as described above), the license applicant(s) could do a cash flow analyses before they submit their applications. A prudent business individual would normally do cash flow projections to decide whether to submit his application(s) to the Commission.

The above recommendation will satisfy the law as mandated by the Budget Act. By retaining the lottery process for designated groups, it would eliminate the risk of court litigations and treat all lottery applicants on an equal basis. Past lotteries helped to shield the Commission from discrimination law suits. It would insure the Commission's goal of rapid deployment of new technologies and services to the marketplace can be achieved.

3. Oral Bidding. Oral bidding will be a handicap to small businesses and individuals who want to obtain one or more licenses. Small business and individual applicants may not have the manpower to participate in the auctions in Washington, D.C. without harming their business(es). The Commission should provide a system and the means to allow individuals and small businesses to make bids by electronic means or by sealed bids.

4. Up-front Payments.

a. The NPRM will require each bidder to place a substantial up-front payment before the auction. If this rule is enacted, the Commission should return the up-front payments to the auction losers within 48 hours. The Commission can deposit the auction losers' funds to a designated account via an electronic cash transfer. The initial filing application (short form) can request each bidder to identify a savings or checking account where the funds can be transfer to after the auction is completed. Otherwise, the auction losers will not have immediate access to the unused funds that could be applied toward other auctions or business ventures.

b. A substantial non-refundable filing fee should be imposed on all lottery applicants. The substantial non-refundable filing fee (e.g., one thousand dollars per application filing) will deter the filing of speculative applications.

5. Group Bidding. Concur with the NPRM proposal to permit group bidding for set of fifty-one Major Trading Area ("MTA") licenses to facilitate a nationwide PCS service if all licenses are auctioned. Group bidding should not be applied to those licenses designated for special groups. The Commission should enact safeguards to prohibit the aggregation of market power that can easily led to anti-competitive conduct. Problem area -- the alliances of major firms (e.g., AT&T and McCAW) will have the financial clout to outbid any alliance of small businesses who are bidding for the same MTA PCS license(s).

6. Auctioning Procedures. Concur. There is a need to establish a variety of auctioning procedures independent of a particular service. However, the Commission should refrain from changing the auctioning methods or the procedures in mid-stream without regard to the applicants who relied upon earlier Commission pronouncements.

7. Clarification to Rulemaking Reference 21. The Commission did not enforce the rules to require the lottery cellular winners to build out their markets. The lack of enforcement opened the flood gates to allow license transfers before the systems were constructed. The Commission rules for Cellular Fill-In, IVDS and LMDS would require licensee(s) to build out and operate their system before the license can be sold.

8. Applicability to Broadcast Television and Radio.

a. Disagree. The NPRM excludes commercial broadcast television and radio from the competitive bidding process. Commercial broadcast television and radio license holders receive compensation for their services indirectly from their advertisers. The Commission should receive annual royalty payments from all new commercial broadcast television and radio licenses.

b. Agree. Non-profit broadcast television and radio licenses should be excluded from the competitive bidding process.

9. Licensee Defaults. The Commission must establish new procedures to

handle late payments or for licensee(s) who defaults on their payments to the U.S. Government. The Commission can use the guidelines used by the Internal Revenue Service ("IRS") to establish the Commission procedures. Late or default payments will be a situation that the Commission must be ready to handle.

Applicants may not have the experience or the resources to overcome major mistake(s). One method the Commission can use to reduce the number of default payments is to require each licensee to obtain bankruptcy insurance. The bankruptcy insurance should pay the outstanding obligation to the U.S. Government if a default condition is declared by the Commission. Any outstanding payments should be charged an interest penalty -- a fixed interest rate established by the prime banking institutions.

If any licensee defaults twice in any twelve month period, the licensee should be ordered to sell the license on the open market. If the licensee has insurance to cover this situation and the insurance company pays the U.S. Government in 60 days, the licensee should retain the license.

10. Performance Requirements. Concur with the Commission efforts to establish performance requirements to prohibit the sell of any license before the system is constructed. The Commission rules for Interactive Video Data Services ("IVDS") is an excellent example that can be used to establish the performance requirements for existing services and future services.

11. Prohibit of Collusion. Recommend the Commission adopt the necessary rules to prohibit the collusion between bidders. The Commission should prohibit bidders, guilty of collusion, in future licensing activities for five years.

12. Application Processing Requirements.

a. Concur with the NPRM proposal to use the short form for all initial application filings.

b. Applicant(s) from a designated group, if selected, should have 45 days to submit an engineering application (long form) to the Commission.

c. The Commission should prohibit the award of licenses to those entities who filed as a trust.

13. Rulemaking Reference 92. No modification to an existing application should be allowed by the Commission for the stated situation.

14. Rulemaking Reference 95. The NPRM proposed to have cashier checks drawn from U.S. banks with assets more than one billion dollars. This rule maybe a handicap to applicants who live in communities with no U.S. banks with assets greater one billion dollars. Delete this proposed rule or lower the U.S. bank asset threshold to a lower number (e.g., one hundred million dollars) for applicants who are competing for licenses by lottery.

15. Rulemaking Section 100. The Commission should establish short term accounts for each bidder by buying Treasury bills to earn interest on the up-front tender payments. Funds collected as lottery filing fees should be excluded from this requirement. Interest earned on the up-front payments should be forward to the auction loser after the auction.

16. Rulemaking Section 111. The NPRM rules should say that any applicant who files a Petitions to Deny, and later the Commission decides the petition to be frivolous, the filing applicant should incur all costs.

17. Application of Competitive Bidding to Specific Services.

a. The Commission needs to clarify how their proposals will effect existing or pending 220-222 MHz license holders.

b. Disagree with the NPRM proposal to apply competitive bidding to future applicants of wide-area Specialized Mobile Radio Service ("SMRS"). Changes in the licensing process at mid-stream will have significant impacts to current and future service providers. Unfair market advantages may exist between pre-existing license holders (applications filed before July 26, 1993) and future license holders because the license acquisition costs may vary significantly from one operator to another in the same market.

c. Sections 150 and 151. Concur with the Commission's proposal to continue the lottery process for Multichannel Multipoint Distribution Service ("MMDS") applications filed before the July 26, 1993. Changes in the licensing process at mid-stream will have significant impacts to current and future service providers. Unfair market advantages may exist between pre-existing license holders (applications filed before July 26, 1993) and future license holders because the license acquisition costs may vary significantly from one operator to another in the same market.

d. Rulemaking Section 152. The Commission should grant or consider Local Multipoint Distribution Service ("LMDS") applications filed before the July 26, 1993 based upon the Court of Appeals decision of McElroy Electronics

Corporation versus F.C.C. The decision dealt with cellular fill-ins, but focused on Administrative Law and Procedure issues. It said the Commission cannot simply change its rules at mid-stream without regard for applicants who relied upon earlier Commission pronouncements. In this case, the applicants never appeared on Public Notice and the ruling required the Commission to consider the applicants filed before the Commission mid-stream changes to the filing regulations.

For LMDS applications accepted by the Commission and placed on Public Notice, the Commission should award the license(s) by lottery (pre-July 26, 1993 rules). If the Commission decides to award the licenses by competitive bidding, then the auction process must be restricted to those pre-rulemaking market applicants.

The NPRM proposals are not applicable to exclusive market filing(s). The Commission should grant licenses of all exclusive application filings without any delay.

As stated in the LMDS Notice of Rulemaking, existing filers are being rejected without consideration. If this rule is enacted, the Commission must declare the existing filers as defective and explain why the pre-rulemaking LMDS applications were defective. This clarification is crucial to all pre-rulemaking LMDS applicants.

f. Rulemaking Sections 158 and 160. The Commission should grant or consider those Cellular Fill-In applications filed before the July 26, 1993 based upon the Court of Appeals decision of McElroy Electronics Corporation versus F.C.C. The decision dealt with cellular fill-ins, but focused on Administrative Law and Procedure issues. It said the Commission cannot simply change its rules at mid-stream without regard for applicants who relied upon earlier Commission pronouncements. In this case, the applicants never appeared on Public Notice and the ruling required the Commission to consider the applicants filed before the Commission mid-stream changes to the filing regulations.

For Cellular Fill-In applications accepted by the Commission and placed on Public Notice, the Commission should award the license(s) by lottery (pre-July 26, 1993 rules). If the Commission decides to award the licenses by competitive bidding, then the auction process must be restricted to those pre-rulemaking market applicants.

The NPRM proposals are not applicable to exclusive market filing(s). The Commission should grant licenses of all exclusive application filings without any delay.

19. Summary of Proposed Auction Procedures.

a. Rulemaking Section 167. The auction consultant(s) hired by the Commission should be an entity who does not any direct or indirect conflicts with the telecommunication industry. The Commission should insure the auctioning process maintains a high degree of integrity. The background of the consultant(s) should be placed on Public Notice to assure no conflict of interest exist.

b. Rulemaking Section 168. The proposed lead time of the bid packages should be at least 120 days for the upcoming auctions.

Respectively submitted,

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By: James M Rhoads

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President

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November 9, 1993